Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ALBERTSON'S, INC.,
Petitioner,

v.

UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION AFL-CIO AND CLC; and LOCALS 44, 81, 367, 381, 555, 1105, 1439, 135, 324, 373, 588, 770, 839, 870, 1036, 1167, 1179, 1288, 1428 and 1442, UNITED FOOD & COMMERCIAL WORKERS UNION,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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I. Respondents' Argument That Certiorari Should Be Denied Because The Parties' Collective Bargaining Agreements Do Not Require The Arbitration Of Statutory Off-The-Clock Work Claims Is Not Supported By Either The Law Or The Record

Citing this Court's decision in *Wright v. Universal Maritime Service Corp.*, ___ U.S. ___, 119 S. Ct. 391 (1998), Respondents argue that certiorari should be denied because the parties' collective bargaining agreements do not contain a "clear and unmistakable" waiver of employees' rights to a judicial forum for resolution of claims that Albertson's required employees to work "off the clock" in violation of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* ("FLSA") and similar state laws. Opp. at 5, 6-15. Respondents' argument should be rejected for three reasons.

First, the standard announced in *Wright* should not apply here, because Albertson's does not contend that the arbitration provisions at issue constitute a waiver of the employees' right to pursue their statutory claims in court. Rather, Albertson's contends that the agreements should be read to require only that employees must attempt to resolve such claims through the contractual grievance/arbitration procedures before pursuing them in court. Because an agreement to exhaust such procedures before proceeding in court does not involve a waiver of a judicial forum, there is no reason to require that the agreement meet the standard announced in *Wright*.

Second, even if *Wright* were found to apply, neither the parties nor the courts below have had an opportunity to evaluate the adequacy of the pertinent arbitration provisions under *Wright*, which was decided after the court of appeals issued its decision in this case. This Court should not base its decision on an untested assumption about the ability of a party to satisfy standards that did not exist at the time the

record on review was created. That is particularly true here, where Respondents attempted to persuade both the district court and the court of appeals that the arbitration provisions did not cover off-the-clock claims arising under the FLSA and state law, but neither court saw fit to decide the case on that basis.[1] As discussed below, Albertson's presented substantial evidence to support its position that the arbitration provisions were in fact intended by the parties to cover statutory off-the-clock claims. In these circumstances, the Court cannot fairly assume that, given the opportunity, Albertson's would be unable to demonstrate that the agreements at issue in this case satisfy the requirements of *Wright*. If the Court believes that *Wright* is potentially applicable in the circumstances of this case, it would be appropriate to remand this case to the lower courts for consideration of whether *Wright* applies where the agreement requires only exhaustion, not waiver, and if it applies, whether its requirements are satisfied by the agreements at issue here.

Third, Respondents' argument is based on an overly narrow reading of *Wright*. To be sure, *Wright* holds that, in order to be effective, a union's waiver of employees' rights to a judicial forum for resolution of statutory claims must be clear and unmistakable. 119 S. Ct. at 396-97. Respondents apparently read the Court's decision to mean that a waiver

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[1] The district court, noting the breadth of the arbitration clauses, assumed that the agreements were broad enough to encompass statutory FLSA claims (App. 27a), and the court of appeals, acknowledging the district court's assumption, tacitly adopted the same assumption. Although Respondents challenge Albertson's assertion that the court of appeals, like the district court, assumed for purposes of its decision that the agreements required arbitration of statutory claims (Opp. at 7 n.5), a simple reading of the Ninth Circuit's decision makes clear that its examination of the case law would have been unnecessary in the absence of such an assumption. App. 4a-9a.

can be effective only if the arbitration clause itself, standing alone and without consideration of other portions of the agreement or other available indicia of the parties' understanding, expressly provides for a waiver.

Such a reading of *Wright* is unwarranted by the rationale underlying the Court's decision. In *Wright*, the general arbitration clauses at issue, although broad, did not explicitly refer to statutory claims of any kind. The employer apparently relied only upon the breadth of the clauses and a presumption in favor of arbitration to establish a waiver. In rejecting the sufficiency of the employer's evidence to establish a waiver, the Court made clear that it was not precluding the consideration of evidence other than the arbitration clause to establish waiver, but rather was saying only that an intention to submit statutory claims to arbitration could not be presumed. "It may well be that ordinary textual analysis of a CBA will show that matters which go beyond the interpretation and application of contract terms are subject to arbitration; but they will not be *presumed* to be so." 119 S. Ct. at 396 (emphasis in original). And although the Court went on to discuss the need for any waiver to be "explicit," *id.*, the Court gave no indication that it was overruling *sub silentio* the long line of judicial authority holding that collectively bargained agreements can take their meaning from more than the literal words of the provisions at issue. *See, e.g., Metropolitan Edison Co. v. National Labor Relations Board*, 460 U.S. 693, 708-09 (1983) ("we do not doubt that prior arbitration decisions may be relevant . . . in interpreting bargaining agreements" (footnote omitted)); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 567 (1960) (in "the interpretation and enforcement of collective bargaining agreements, we think special heed should be given to the context in which collective bargaining agreements are negotiated and the purpose which they are

intended to serve"); *Transportation-Communications Employees Union v. Union Pac. R.R. Co.*, 385 U.S. 157, 161 (1966) ("In order to interpret [a collective bargaining agreement] it is necessary to consider the scope of other related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements."); *Teamsters Indus. Emp. Welfare Fund v. Rolls-Royce Motor Cars, Inc.*, 989 F.2d 132, 135 (3d Cir. 1993) (extrinsic evidence to be considered in contract interpretation includes "the structure of the contract, the bargaining history, and the conduct of the parties that reflects their understanding of the contract's meaning").[2]

Moreover, the exclusion of such pertinent evidence of intent would serve to frustrate the legitimate expectations of many parties to pre-*Wright* collective bargaining agreements, whose undisputed and manifest intent may have been to require the arbitration of statutory claims but who, not having the benefit of *Wright* at the time of their negotiations, did not happen to craft their agreement in language that would satisfy the recently imposed standard. Such parties should not be precluded from establishing their intent through traditional means.

Unlike the employer in *Wright*, Albertson's proffered substantial evidence to support its position that the arbitration clauses of its collective bargaining agreements were intended

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[2] The requirement in *Wright* that a waiver be clear and unmistakable was adopted from *Metropolitan Edison Co. v. National Labor Relations Board*, 460 U.S. at 708. Although the Court in that case rejected a contention that "the union's failure to change the relevant contract language in the face of two prior arbitration decisions constitutes an implicit contractual waiver," *id.*, it did so only because it found the two decisions insufficient to establish a pattern clear enough to convert the union's silence into a waiver. *Id.* at 709. The Court clearly indicated that in the appropriate circumstances, prior arbitration decisions could provide a basis for finding a "clear and unmistakable" waiver. *Id.*

to require the arbitration of claims arising under wage and hour laws such as the FLSA. Albertson's collective bargaining agreements with the UFCW locals contain provisions that clearly prohibit off-the-clock work pursuant to federal and state wage and hour laws. *See* CR 17 (Decl. Of Kathryn Bush) at ¶¶ 3-8. For example, many of the California agreements explicitly provide that "*the law* and the Union Agreement require that *all time worked* shall be recorded daily, including starting and stopping time." *Id.* at ¶ 4 (emphasis added). Similarly, the agreements with all of the Washington locals uniformly state, "[I]t is intended that there shall be no 'free or time off-the-clock' work practices under this Agreement." *Id.* at ¶ 3.

As Albertson's argued below, the parties' use of terms such as "the law," "all time worked," and "free" and "off-the-clock" work in their collective bargaining agreements reflected their intent to incorporate statutory claims for off-the-clock work into those agreements, and to make such claims subject to the grievance-arbitration procedures. Respondents themselves used such terminology to allege violations of the FLSA and state wage and hour laws in their complaints and pleadings in this action, and the Department of Labor commonly uses such terminology in its own litigation under the FLSA. *See, e.g., Brock v. Big Bear Mkt. No. 3*, 825 F.2d 1381 (9th Cir. 1987); *Reich v. Petroleum Sales, Inc.*, 30 F.3d 654 (6th Cir. 1994); *Brock v. Norman's Country Mkt., Inc.*, 835 F.2d 823 (11th Cir.), *cert. denied sub nom. Norman's Country Mkt., Inc. v. McLaughlin*, 487 U.S. 1205 (1988). That the negotiated contract provisions do not precisely mirror the FLSA and similar state laws in all respects does not alter the fact that the parties' use of the statutory terminology reflects their mutual intent to make claims for wage and hour violations subject to the contractual dispute resolution process. Indeed, this intent is

confirmed by the parties' longstanding prior practice of submitting off-the-clock claims to the grievance process. CR 17 at ¶ 19, exh. 35.

Thus, in contrast to the employer in *Wright*, Albertson's does not rely solely upon a broad arbitration clause and a presumption in favor of arbitration to establish the necessary waiver, but instead points to additional provisions of the pertinent collective bargaining agreements and the parties' past practice to show an understanding and intent that off-the-clock claims arising under the FLSA and state statutes were to be subject to the contractual grievance/ arbitration process. *See* CR 17 at ¶¶ 9-15. In these circumstances, there can be no justification for simply assuming that the collective bargaining provisions at issue cannot meet the standards announced in *Wright*.

II. The Court Should Not Deny Certiorari Because Of Albertson's Alleged Failure To Exhaust Its Contractual Remedies

Respondents' suggestion that the Court should deny certiorari because of Albertson's failure to submit to arbitration its claim that statutory wage claims are subject to the contractual dispute resolution process (Opp. at 16-17) is without merit. Albertson's does not seek judicial resolution of any contract-based claim; rather, Albertson's seeks only an order requiring Respondents to comply with their contractual obligation to submit their off-the-clock work claims to arbitration. Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, provides for jurisdiction over such efforts to enforce collectively bargained arbitration clauses. *See, e.g., Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 449-51 (1957); *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 651 (1986) ("It was for the court, not the arbitrator, to decide in

the first instance whether the dispute was to be resolved through arbitration"); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) ("The Congress has by § 301 of the Labor Management Relations Act, assigned the courts the duty of determining whether the reluctant party has breached his promise to arbitrate.").

III. Respondents' Remaining Arguments Demonstrate That The Issue Raised By The Petition Is Substantial And Warrants This Court's Attention

The remainder of Respondents' opposition is devoted to a discussion of their view of the merits of the arguments presented in Albertson's petition, which need not be repeated here. By their nature, Respondents' contentions serve to confirm that the issue presented by Albertson's Petition is substantial and important, and requires resolution by this Court.

Only a few points raised in Respondents' Opposition require response here. Respondents first dispute Albertson's assertion that the Ninth Circuit's ruling conflicts with the rationale underlying the Fourth Circuit's decision in *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir.), *cert. denied*, 519 U.S. 980 (1996), which held that a collectively bargained agreement to arbitrate a statutory claim arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, was enforceable. Opp. at 15. Respondents note that the Fourth Circuit expressed the view that the absence of a statutory provision in the FLSA encouraging arbitration would require a different result in a case seeking to arbitrate a claim arising under that statute. 78 F.3d at 882-83 n.2. This statement, however, was pure dicta, and for all the reasons set forth in Albertson's petition is wrong in any event. Respondents also cite the Fourth Circuit's interpretation of *Barrentine v. Arkansas-Best*

Freight System, Inc., 450 U.S. 728 (1981), as indicating that arbitration is not available under the FLSA. Again, however, this dicta cannot be squared with the Court's actual reasoning in *Barrentine*, and in any event does not alter the fundamental fact that the rationale adopted by the Fourth Circuit in enforcing a collectively bargained agreement to arbitrate a claim under Title VII conflicts with that adopted by the Ninth Circuit in this case.

Respondents' discussion of this Court's precedents regarding the arbitrability of statutory claims (Opp. at 17-26) requires little response beyond that presented in the Petition. Significantly, however, Respondents place principal reliance on *Barrentine*, asserting at one point that the Court concluded in that case that employees retained a right to sue for violations of the FLSA whether or not they had submitted their claims to the contractual grievance process, even though "the dispute resolution provision at issue–covering any controversy that might arise–was broad enough to encompass the employees' FLSA claims . . . ." Opp. at 19-20. Respondents later acknowledge, however, that "the *Barrentine* line of cases did not involve an agreement to arbitrate statutory claims, but rather contract-based wage claims arising under the CBA, and thus, the labor arbitrators in these cases lacked authority to resolve statutory claims . . . ." Opp. at 21. As explained in the Petition, one of the principal concerns in *Barrentine*, *i.e.*, the absence of an agreement to arbitrate statutory claims and the corresponding limitation of the arbitrator to deciding only contractual claims, is not present in the instant case. Pet. at 10-11. Another principal concern—the perceived difficulties that a union would have in protecting individual statutory rights—is counterbalanced by other considerations that serve to ensure that unions act in the interests of the employees they represent. Pet. at 12-17. All of the concerns raised by

Respondents are significantly reduced if not entirely eliminated if employees are merely required to exhaust available arbitration procedures as a prerequisite to bringing a court action.[3] Pet. at 12-13.

Respondents' final arguments regarding the alleged disadvantages of arbitration vis-a-vis a judicial forum (Opp. at 27-28) are similarly flawed. A requirement that employees exhaust contractual remedies prior to pursuing their claims in court provides a reasonable accommodation with the interests that undergirded this Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), and ensures that employees retain the benefits of a judicial forum while also providing them an opportunity to enjoy the substantial benefits that an arbitral remedy can provide. Pet. at 21-24.

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[3] Respondents challenge Albertson's position that an exhaustion requirement would serve both the interest in enforcing agreements to resolve employment disputes through contractual arbitration procedures, and the interest in enforcing individual rights under statutes such as the FLSA. Opp. at 20 n.19. According to Respondents, "[e]ither there is a waiver of the right to a judicial forum or there is not." *Id.* But even if the interest in preserving individual rights to a judicial forum is determined to be so great as to preclude a complete waiver of that right, that would not prevent the imposition of a judicially created obligation to exhaust available contractual remedies before exercising that right.

CONCLUSION

For the reasons stated herein and in its Petition, Albertson's respectfully requests that a writ of certiorari be issued to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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